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No. 88-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CSX CORPORATION and
CSX TRANSPORTATION, INC.,

Petitioners,

v.

FOLKSTONE MARITIME, LTD.
and M/V PONTOKRATIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an appeal of a District Court order setting the amount of bond (F.R.Civ.P. Supplemental Rule E(5)(a)) required to release an arrested vessel is rendered moot when the required bond is posted and the vessel leaves the jurisdiction?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below and before this Court are the petitioners, CSX Corporation and CSX Transportation, Inc., and the respondents, Folkstone Maritime, Ltd., *in personam*, and the M/V Pontokratis, as it is proceeded against *in rem*.

Folkstone Maritime, Limited is a corporation organized under the laws of the Republic of Cyprus. It has no parent corporations, subsidiaries, or affiliates.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Folkstone Maritime, Ltd. and M/V Pontokratis respectfully oppose the granting of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above styled proceeding on January 26, 1989 and March 9, 1989.

OPINIONS BELOW

The Amended Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Rovner, D.J.) is reported at 1989 A.M.C. 862. The opinion and order of the United States Court of Appeals for the Seventh Circuit dismissing petitioner's appeal is reported at 866 F.2d 955, 1989 A.M.C. 867. The March 9, 1989 Order of the Court of Appeals for the Seventh Circuit denying CSX's Petition for Rehearing has not been reported.

JURISDICTION

On January 26, 1989, the Seventh Circuit dismissed the railroad's appeal as moot. As neither the district court nor the Seventh Circuit had the power to compel the return of the Pontokratis, "any review of the district court's determination of the amount of release bond [would be] an 'empty rite'." 866 F.2d at 957, 1989 A.M.C. at 870. Rehearing was denied on March 9, 1989.

While Petitioners suggest that this Court has jurisdiction under 28 U.S.C. sec. 1254(1), Respondents submit that the Seventh Circuit was correct and this controversy remains moot. This contention is more fully explained in Reasons for Denying the Writ set out below.

STATUTES AND RULES INVOLVED

Supplemental Rule C. Actions in Rem: Special Provisions

Rule C(1)(a)—

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

STATEMENT OF PERTINENT FACTS

This case arises out of the collapse of CSX's single leaf bascule railroad bridge upon the shipowner's motor vessel Pontokratis on May 6, 1988 while the ship was navigating on the Calumet River in Chicago. The shipowner, Folkstone Maritime, Ltd. (Folkstone), filed suit against CSX on May 9, 1988. On May 11, 1988, CSX filed its Answer to the Complaint and asserted a counterclaim against the shipowner and a claim designated as a counterclaim against the Pontokratis *in rem* and caused the vessel to be arrested the same day.

As the railroad demanded security of $24,000,000 to secure the release of the vessel which, in its damaged condition, was worth but $4,580,000, Folkstone sought a hearing under Rule E(5)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims to fix the security required to release the vessel from arrest.

On May 20, 1988, the district court heard testimony of Demetri Antippas, a naval architect and marine consultant experienced in the appraisal of vessels, by deposition, and

Leonidas Moustakis, managing director of Ocean Freighters, Ltd., Piraeus, Greece, as to the Pontokratis' value following the accident of May 6. CSX offered the testimony of Harry J. Ottaway of New York, an experienced vessel appraiser. CSX also offered the testimony of David A. Novick, a bridge construction engineer, who testified the subject railroad bridge would cost approximately 12.1 million dollars to replace. Stephen K. Ramsey, CSX's engineer of bridges and buildings testified the cost of demolishing the bridge and cleaning the site will approximate $1,060,000. Folkstone contended the amount of security should be limited to the value of the vessel after the accident while CSX argued that it was entitled to security of twice the amount of its alleged damages, but sought a bond in the "area of $15,000,000."

Using sales of comparable vessels, and adjusting for variations in the freight market, Leonidas Moustakis expressed the opinion that the pre-accident market value of the vessel was $8,000,000. Mr. Dimitri Antippas opined that the precasualty value of the Pontokratis was $7,982,039. Mr. Ottaway, using sales of comparable vessels opined the sound value was $9,000,000, but the sales he used for comparison were made at the height of the freight market, and he made no adjustment for the decline in the market between February and May.

The district court found that on the date of the Pontokratis' arrest, she had been substantially damaged, was unseaworthy, and not marketable as a trading vessel. Efforts were underway to return the vessel to trading at the least possible loss taking into account the cost of repairs, the cost of towage to a shipyard, and the time to be lost during the course of repairs.

Estimates of the cost of repairs varied from shipyard to shipyard between 3 and 3.5 million dollars. The cost of towage varied, depending upon the distance of the shipyard, from $250,000 to $461,000. Time for repairs varied from shipyard to shipyard. The least cost of towage and repairs is 3.25 million dollars. Temporary repairs to make the vessel "towworthy" were estimated at a minimum of $20,000. While in the shipyard, additional expenses of superintendence, agency, surveys, crew, and security, which were not included in the shipyard repair cost, were estimated to be between $150,000 and $350,000.

On May 27, 1988, the district court issued its opinion and order setting the principal sum of the bond required to release the Pontokratis from *custodia legis* at $4,580,000. The district court held that Supplemental Rule E(5)(a) supersedes 28 U.S.C. sec. 2464 and is a valid rule of civil procedure that must be applied. The district court also held that valuation of the Pontokratis must be based on her damaged condition at the date of arrest. On June 2, 1988, CSX's Motions for Reconsideration or, in the alternative, for certification under 28 U.S.C. sec. 1292(b) were denied, although the district court did amend its opinion in some typographical particulars.

On June 3, 1988, the railroad appealed to the Seventh Circuit Court of Appeals. On June 6, 1988, Folkstone filed its vessel release bond and requested the clerk to issue a Writ of Restitution ordering the Marshal to release the vessel and also accept the filing of a cost bond of $250 required by Local Admiralty Rule 13. The clerk declined to issue the Writ of Restitution notwithstanding the provisions of Supplemental Rule E(5)(c).

On June 9, 1988, Folkstone sought an order from the district court directing the Clerk to issue a Writ of Resti-

tution and approve a cost bond, but the district court denied this motion holding that it had lost jurisdiction because of the docketed appeal. An emergency motion was filed in the Seventh Circuit on June 13, 1988, and on June 15, 1988, the court ruled that the district court retained jurisdiction to perform this ministerial act in furtherance of its order of May 27, 1988.

On June 16, 1988, the district court ordered the clerk to issue a Writ of Restitution and accept Folkstone's cost bond. CSX's motion to stay release of the Pontokratis pending appeal was denied by the district court. CSX's Second Notice of Appeal was filed the same day. CSX's Emergency Motion in the Seventh Circuit to stay the district court's order was also denied that afternoon. The ship was released from *custodia legis* on June 16, 1988 after having been under arrest for thirty-eight days while CSX's counsel sought to have the shipowner post a bond of at least $15,000,000 to release the Pontokratis, which was worth $4,580,000 at the time of her arrest.

Although the Pontokratis left the United States, the railroad's appeal remained pending. During oral argument, the court, on its own initiative, questioned whether the appeal was moot in light of the vessel's departure. On January 26, 1989, the Seventh Circuit dismissed the appeal as moot. CSX's Petition for Rehearing was denied on March 9, 1989.

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

In dismissing the railroad's appeal, the Seventh Circuit applied the principle that the exercise of judicial power requires the existence of an actual case or controversy at all stages of appellate review. Where a decision would mean nothing to the litigants because changed circumstances preclude a court from granting any relief, the issue on appeal is moot and must be dismissed. The Seventh Circuit recognized that since the Pontokratis was released on bond pursuant to the district court's order and left the territorial jurisdiction of the court, review of the decision would be an "empty rite" as neither court possessed the power to recall the vessel.

The Seventh Circuit reasoned that since the Pontokratis was freed of CSX's maritime lien by transfer of the lien to the bond, the vessel could not be rearrested on the same claim. As the rule protects the interests of subsequent lienholders and facilitates the free movement of maritime commerce, it has been uniformly applied in this Court and the active admiralty courts of appeal and district courts. Therefore, review of whether the district court was correct in releasing the Pontokratis pursuant to Supplemental Rule E(5)(a) was meaningless. As the rights of the parties concerning security can no longer be affected, further consideration of this issue would result in no more than an advisory opinion. Folkstone submits that the Seventh Circuit properly decided that the issue was moot.

II.

AS THE RIGHTS OF THE LITIGANTS CANNOT BE AFFECTED, THE SEVENTH CIRCUIT CORRECTLY RECOGNIZED THAT CSX'S APPEAL WAS MOOT.

The analysis of whether an issue presented for appellate review is moot begins with the proposition that "federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). The mootness doctrine requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1984). *See also Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Stemming from the "case or controversy" requirement of Article III of the Constitution, issues on appeal must present "a real and substantial controversy admitting of specific relief through a decree of conclusive character." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937), to assure both adversity between the parties and remedial power of the court. In contrast, the moot case seeks "a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment on some matter which, when rendered, cannot have any practical effect upon a then existing controversy." *Ex Parte Steele*, 162 F. 694, 701 (N.D. Ala. 1908).

Where a reviewing court loses the ability to give relief because of a change in the controlling facts, the appeal is rendered moot. *See De Funis v. Odegaard*, 416 U.S. 312, 319-20 (1974). Such situations may arise when a court finds that it cannot undo what has been done, *Jones v. Montague*, 194 U.S. 147, 153 (1904); *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571,

573-74 (9th Cir. 1984), or where a change in legal status makes any decision a nullity. *See Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982).

> It necessarily follows that when, pending an appeal from the judgment of a lower court, and without fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

Mills v. Green, 159 U.S. 651, 653 (1895). In such cases, "there is no binding order that can be given which would change the relationship between the [litigants]. . . ." *Potomac River Ass'n., Inc. v. Lundeberg Maryland Seamanship School, Inc.*, 402 F.Supp. 344, 351 (D. Md. 1975).

A. The Release Of The Pontokratis On Bond By Order Of The District Court Discharged Her From CSX's Maritime Lien And Precludes Rearrest On The Same Claim Thereby Mooting The Appeal.

In the present instance, CSX seeks to execute an alleged maritime lien stemming out of the accident with the bridge. *See* G. Gilmore & C. Black, *The Law of Admiralty* 498 (2d ed. 1975). The maritime lien is a substantive right, not part of the procedural law of admiralty. *Saylor v. Taylor*, 77 F. 476, 479-80 (4th Cir. 1896), which is executed only by the use of *in rem* procedure in a federal court sitting in admiralty. *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867). Existence of the lien is an essential predicate to the institution of an *in rem* action. *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213, 215 (1867); *Amstar Corp. v. S.S. Alexandros T.*, 664 F.2d 904, 908, 1981 A.M.C. 2697, 2703 (4th Cir. 1981). CSX invoked this pro-

cedure through use of Supplemental Rules C and E. *See* Supplemental Rule C(1)(a) F.R.Civ.P. (action *in rem* may be brought to enforce any maritime lien).

These rules also provide the procedure for release of property and vessels on security. Release of a vessel on the posting of security transfers the lien from the vessel into the fund, discharges the vessel from the lien, and precludes rearrest of the vessel. *United States v. Ames*, 99 U.S. 35, 41-43 (1878). As Professors Gilmore and Black pointed out:

> With respect to a lien in suit the effect of the release is to transfer the lien from the ship to the fund represented by the bond or stipulation. The lien against the ship is discharged for all purposes and the ship cannot again be libeled *in rem* for the same claim.

G. Gilmore & C. Black, *supra*, at 799. First expressed in American courts prior to the Civil War, *see The White Squall*, 29 F.Cas. 1052, 1053 (S.D.N.Y. 1857) (No. 17,570); *The Union*, 24 F.Cas. 535, 537 (S.D.N.Y. 1857) (No. 14,346), this rule has been uniformly applied by this Court and by courts in nearly all circuits. *See United States v. Ames*, *supra*, at 40-42; *Industria Nacional Del Papel, C.A. v. M/V Albert F.*, 730 F.2d 622, 1985 A.M.C. 1437, 1441 (11th Cir. 1984), *cert. denied*, 469 U.S. 1037, 1985 A.M.C. 2397 (1984); *Alyeska Pipeline Service Co. v. Vessel Bay Ridge*, 703 F.2d 381, 384, 1983 A.M.C. 2719, 2721-22 (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247, 1984 A.M.C. 2401 (1984); *Overstreet v. Water Vessel Norkong*, 706 F.2d 641, 643 n.2 (5th Cir. 1983); *United States v. Ohio Valley Co.*, 510 F.2d 1184, 1189-90, 1975 A.M.C. 1477, 1486 (7th Cir. 1975); *United States v. Tito Campanella Societa di Navigazone*, 214 F.2d 457, 458, 1954 A.M.C. 1519, 1520 (4th Cir. 1954); *Hawgood & Avery Transit Co. v. Dingman*, 94 F. 1011, 1013-14 (8th Cir. 1899); *Maritima Antares, S.A. v. M/V Essi Camilla*, 633 F.Supp. 694, 695-96,

1987 A.M.C. 498, 499 (E.D. Va. 1986); *Globe Barge, Inc. v. Johness Hunter, Inc.*, 1986 A.M.C. 1989, 1993 (E.D. La. 1986); *Southern Oregon Production Credit Ass'n v. O/S Sweet Pea*, 435 F.Supp. 454, 458, 1977 A.M.C. 638, 643 (D. Ore. 1977); *Morris v. Ulizio*, 4 F.Supp. 920, 921, 1934 A.M.C. 70, 71-72 (D. Del. 1933); *J.K. Welding Co. v. Gotham Marine Corp.*, 47 F.2d 332, 335, 1931 A.M.C. 407, 408 (S.D.N.Y. 1931); *The Gasconier*, 8 F.2d 104, 105-06, 1924 A.M.C. 1245, 1246-47 (E.D.N.Y. 1924); *The Comanche*, 1923 A.M.C. 201, 203 (W.D. Wash. 1922); *The Mutual*, 78 F. 144 (D. Conn. 1897); *The William F. Mc Rae*, 23 F. 557, 558 (E.D. Mich 1885); *The Old Concord*, 18 F.Cas. 642, 643 (E.D. Mich. 1870) (No. 10,482). *Cf.* Supplemental Rule C(4) advisory committee note (no point in publishing notice of arrest after release on security as "the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings").

The policies supporting this rule are both obvious and salutary. By transferring the maritime lien to the bond, the owner receives the benefit of the return of his vessel unencumbered by the lien while the lienholder has the advantage of a specific security not subject to the claims of other lienors, *J.K. Welding, supra*, at 335, 1931 A.M.C. at 410, without the depreciation occurring while a seized vessel remains in *custodia legis*, *United States v. F/V Fortune*, 1987 A.M.C. 2351 (D. Alaska 1987), and the risk of possible loss of the vessel. *Collins Machine Works v. The Ocean Mist*, 1977 A.M.C. 1139 (E.D. Va. 1977). On the other hand, allowing rearrest on the lienholder's claim of insufficient security impairs the rights of other lienholders or subsequent purchasers of the vessel. *See Hawgood & Avery Transit, supra*, at 1014 (impairment of the rights of other lienholders); *Southern Oregon Production, supra*, at 458-59, 1977 A.M.C. at 644 (protection of bonafide purchasers); *The Union, supra*, at 537 (prejudice to bonafide

purchasers). *Cf. The Frank G. Fowler*, 17 F. 653 (2d Cir. 1883) (maritime liens later in time have priority under the inverse order rule). Moreover, rearrest would subvert the policies supporting the Limitation of Liability Act, 46 U.S.C. secs. 183-189, by allowing recoveries *in rem* larger than the value of the vessel after the owner has successfully established his right to limitation. *See Maritima Antares, supra*, 633 F. Supp. at 696, 1987 A.M.C. at 500. *Cf. Ohio Valley, supra*, 510 F.2d at 1190 n.13, 1975 A.M.C. at 1487.

CSX seeks to equate the rule of the *The Rio Grande v. Otis*, 90 U.S. (23 Wall.) 458 (1875) with the judicial power to decide the railroad's appeal. In *The Rio Grande*, defendants questioned the power of the Circuit Court of Appeal to adjudicate the existence of libellant's lien for repairs because of the marshal's mistake in releasing the vessel pending appeal. It is important to note that the appellate court had neither the vessel nor a release bond before it when it reversed the district court. In holding that an accidental, fraudulent, or improper removal of the *res*, or release on security does not destroy jurisdiction, this Court was speaking to ability to adjudicate the merits of the libellant's lien.

In the present case, a 4.58 million dollar bond has been posted for release of the Pontokratis. CSX's alleged lien has been transferred to the bond. The Seventh Circuit did not need to ask whether it or the district court possessed *in rem* jurisdiction. It is also clear that the court did not answer that question. No one has doubted the jurisdiction of the district court to decide the merits of the collision claim.

In contrast, the *Rio Grande* and its progeny deal with the jurisdiction of courts that possess neither the *res* seized or a substitute. The jurisdictional question posed in the cases cited by Petitioner presuppose the absence of both

in enquiring whether *The Rio Grande* might apply. CSX incorrectly argues that the ability of the district court to adjudicate a maritime lien in an *in rem* proceeding confers the power to rearrest a vessel previously discharged from a maritime lien through the posting of bond. There is no conflict between the rule that release of a vessel on bond transfers the maritime lien to the bond thereby precluding rearrest on the same claim and the rule of *The Rio Grande*. The Seventh Circuit followed the controlling law and correctly found that inability to recall the vessel rendered the appeal moot.

B. Folkstone's Presence *In Personam* In The District Court Cannot Be Translated Into Additional Security.

Likewise, Folkstone does not dispute its presence *in personam*. CSX has a right to a recovery *in personam* for a deficiency should it prove Folkstone's negligence. *See* G. Gilmore & C. Black, *supra*, at 801. Additionally, the railroad has a right to appeal both *in rem* and *in personam* when the decision on the merits of the underlying collision case go against it. However, appeal of the bond issue does not depend on whether Folkstone is present *in personam*. The Seventh Circuit considered mootness by examining the bond issue in terms of its ability to grant relief. The railroad did not and cannot show how any court could grant its request for additional security. *Cf. Thyssen Steel Corp. v. Federal Commerce & Navigation Co.*, 274 F.Supp. 18, 1968 A.M.C. 1582 (S.D.N.Y. 1967) (process *in rem* may be served only within the district); *Impala Trading Corp. v. Hawthorne Lumber Co.*, 200 F.Supp. 261, 1962 A.M.C. 2021 (S.D.N.Y. 1961) (district court in New York could not order the sale of cargo in Honduras). As the Seventh Circuit pointed out, dismissal or striking of pleadings "would not translate into any

additional security for the Railroad in this action." *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955, 958, 1989 A.M.C. 862, 871 (7th Cir. 1989).

CONCLUSION

In creating issues where none exist, CSX ignores the nationally uniform rule in admiralty that release on bond discharges the vessel from the maritime lien precluding arrest on the same claim along with the Seventh Circuit's clear statement that "any review of the district court's determination of the amount of release bond [would be] an 'empty rite', and therefore moot." *Folkstone, supra*, 866 F.2d at 957, 1989 A.M.C. at 870. As neither the court of appeals nor the district court can fashion any relief that would result in additional security, the appeal is moot. Respondents respectfully submit that the issue remains moot and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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